

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

BONAVITACOLA ELECTRIC	:	
CONTRACTOR, INC., et al.,	:	
	:	CIVIL ACTION
Plaintiffs,	:	
v.	:	
	:	
BORO DEVELOPERS, INC., et al.,	:	NO. 01-5508
	:	
Defendants.	:	

MEMORANDUM

Baylson, J.

February 12, 2003

The issue presented is whether Plaintiffs' RICO Complaint should be dismissed for failure to state a claim upon which relief can be granted. The Plaintiffs in the instant action are: (1) Bonavitacola Electric Contractor, Inc. ("Bonavitacola"), a contractor that provides electrical services to governmental agencies and commercial and industrial accounts in Pennsylvania and New Jersey; (2) two labor unions, Local Union No. 654, International Brotherhood of Electrical Workers, and Local Union No. 98, International Brotherhood of Electrical Workers, which provide labor to electrical contractors such as Bonavitacola; and (3) Curtis Bell, an individual who is identified as an employee, agent, servant or representative of one of the Defendants, Boro Developers, Inc. (collectively, "Plaintiffs").

The Defendants are identified as Boro Developers, Inc. ("Boro"), a corporation engaged in the business of providing electrical services to governmental and private accounts, and two individuals, Frederick J. Shapiro and Bruce J. Shapiro, both alleged to be officers and employees of Defendant Boro, as Chief Executive Officer and Chief Operating Officer of Boro, respectively

(collectively, “Defendants”).

Plaintiffs brought their original Complaint under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (“RICO”) (24 Counts)¹, and state law claims (interference with prospective contractual relations, unjust enrichment and under 43 PA. STAT. ANN. § 260 (3 Counts)). In Bonavitacola Elec. Contractor, Inc. v. Boro Developers, Inc., No. CIV.A.01-5508, 2002 WL 31388806 (E.D. Pa. Oct. 23, 2002) (“Bonavitacola I”), this Court granted Defendants’ Motion to Dismiss Plaintiffs’ Complaint, but granted leave to amend. This Court found that the Complaint was “woefully short of the . . . RICO requirements” because the Complaint: (1) did not contain any specific allegation of acts of mail or wire fraud; (2) failed to explain how any of the alleged acts by Defendants furthered the scheme to defraud or was incident to an essential part of that scheme; and (3) contained insufficient allegations as to enterprise, relatedness and continuity. Id. at *4. Although this Court believed that it would have been justified in dismissing the Complaint with prejudice, the Court allowed Plaintiffs to amend their Complaint and set forth specific guidelines for Plaintiffs to follow in amending their Complaint, including a requirement that the Amended Complaint include or be accompanied by a “RICO Case Statement,” as described in Bonavitacola I. Id.

Plaintiffs filed their Amended Complaint on November 11, 2002, and Defendants filed their Motion to Dismiss Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) on December 3, 2002. For the reasons set forth below, the Court will grant Defendants’ Motion to Dismiss.

¹ The parties agreed to withdraw Counts XVI through XXIV of the Complaint, which allege violations of § 1962(d) of RICO, on July 1, 2002.

I. Legal Standard on Rule 12(b)(6) Motion to Dismiss

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court may look only to the facts alleged in the complaint and its attachments. See Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1251, 1261 (3d Cir. 1994). The court must accept as true all well pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. See Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted only when it is certain that no relief could be granted under any set of facts that could be proved by the plaintiff. See Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

II. Allegations of the Amended Complaint

As in its original Complaint, Plaintiff Bonavitacola alleges it is a competitor of Boro, and that, over a period of years, Defendant Boro has solicited and received business through competitive bids to various public entities located in this district, and also the U.S. Department of Navy. A requirement of the bids is that the contractor comply with the Pennsylvania Prevailing Wage Act, 43 PA. STAT. ANN. § 165-1 et seq., and the Davis-Bacon Act, 40 U.S.C. § 276 et seq. The Amended Complaint alleges that Defendants, in submitting bids on behalf of Defendant Boro, certified that Boro would comply with the aforesaid Pennsylvania and federal statutes, but knowingly and willfully submitted false and fraudulently made bids, and Defendants engaged in a fraudulent practice of falsifying Certified Payroll Reports and other certifications, which were required to be submitted to the awarding agencies. (Am. Compl. ¶ 34.) The Amended Complaint alleges that Defendant Boro received these awards based upon the false certifications.

The first nine Counts of the Amended Complaint charge a violation of § 1962(a) of

RICO. In the first Count, which is the most detailed, Plaintiff Bonavitacola alleges that Defendant Boro submitted false certifications to the Ridley School District, the U.S. Department of Navy and the Neshaminy School District. In Bonavitacola I, the Court found that, although the Complaint alleged in conclusory terms that Defendants committed mail or wire fraud, there were no specifics of dates of mailings or wire transmissions, and the Complaint was completely conclusory, ignoring well settled requirements for RICO pleadings in many cases previously decided in this district. Bonavitacola I, 2002 WL 31388806, at *1.

The remaining eight Counts under § 1962(a) make claims for each of the Plaintiffs (except Curtis Bell) against the three Defendants, charged individually.

Counts X through XV (either specifically or by incorporating previous paragraphs by reference) charge violations of § 1962(c) of RICO by the Plaintiffs (except Curtis Bell) against each Defendant individually, and allege in each Count that the individual Defendant “conducted or participated in the conduct of the affairs of Boro through a pattern of racketeering as aforementioned.” In the Amended Complaint, Plaintiffs allege that Defendant Boro constituted an “enterprise” (Am. Comp. ¶ 39) and that Boro, Frederick Shapiro, and Bruce Shapiro, are each a “person capable of holding a beneficial interest in property within the meaning of 18 USCA § 1961(3).” Id. ¶¶ 40, 47, 54.

Count XVI is brought by Plaintiff Bonavitacola against all Defendants for interference with prospective contractual relations; Count XVII is brought by Plaintiff Bonavitacola against all Defendants for unjust enrichment; and Count XVIII is brought by Plaintiff Curtis Bell against all Defendants charging a violation of 43 PA. STAT. ANN. § 260.

III. Changes Made in the Amended Complaint

Plaintiffs made very few substantive changes from the original to the Amended Complaint, and failed to include a RICO case statement, despite this Court's clear mandate that they do so. Although Plaintiffs restructured the allegations under "Jurisdiction and Venue," the only substantive change is the inclusion of a brief discussion on supplemental jurisdiction.

Plaintiffs added subparagraphs (a)-(aaaa) under paragraph 42(A)(2), subparagraphs (a)-(y) under paragraph 42(B)(2), and subparagraphs (a)-(p) under paragraph 42(C)(2). Although most, but not all, of the new subparagraphs itemize specific Certified Payroll Reports and dates, Plaintiffs do not set forth any details on the requirements of RICO, as specified in Bonavitacola I.

The final changes made in the Amended Complaint are that Counts XVI-XXIV of the original Complaint, which alleged violations of § 1962(d) of RICO, are not included in the Amended Complaint. Also, Plaintiffs added paragraph 109 in Count XVIII of the Amended Complaint alleging that Defendants "agreed to pay Curtis Bell those wages and multi-employer benefits due to him as a result of his performance of electrical constructed" at some job sites.

IV. Sufficiency of the Amended Complaint

As noted above, Plaintiffs² now assert RICO violations pursuant to 18 U.S.C. § 1962(a) and (c), which state, in relevant part:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of § 2, Title 18, United States Code, to use or invest,

² Only Plaintiffs Bonavitacola, Local Union No. 654, and Local Union No. 98 assert RICO claims. Plaintiff Curtis Bell only asserts a violation of 43 PA. STAT. ANN. § 260 by all Defendants.

directly or indirectly, any part of such income or the proceeds of such income in acquisition of any interest in or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962. To successfully plead a civil RICO violation under these subsections, a plaintiff must allege either “a pattern of racketeering activity” or the “collection of an unlawful debt.” H.J. Inc. v. Northwestern Bell Tele. Co., 492 U.S. 229, 232, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989); Agency Holding Corp. v. Malley-Duff & Assoc., Inc., 483 U.S. 143, 154, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987) (“[t]he heart of any RICO complaint is the allegation of a pattern of racketeering.”).

To be successful in a complaint relying on a pattern of racketeering activity, a plaintiff must allege the details required in the court's description of a RICO case statement: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. Warden v. McLelland, 288 F.3d 105, 114 (3d Cir. 2002).

A. Enterprise

1. Section 1962(c)

Under § 1962(c), RICO liability requires conduct by a “person employed by or associated with any enterprise.” 18 U.S.C. § 1962(c). “Person” includes “any individual or entity capable of holding a legal or beneficial interest in property.” 18 U.S.C. § 1961(3). “Enterprise” includes “any individual, partnership, corporation, association, or other legal entity, and any union or

group of individuals associated in fact although not a legal entity.” 18 U.S.C. § 1961(4). In order to allege a RICO enterprise, the Third Circuit has identified three elements: (1) that there be an ongoing organization; (2) that the associates function as a continuing unit; and (3) that the enterprise is an entity separate and apart from the pattern of activity in which it engages. Curtin v. Tilley Fire Equipment Co., No. CIV.A.99-2373, 1999 U.S. Dist. LEXIS 19467, at *10 (E.D. Pa. Dec. 14, 1999) (citing U.S. v. Console, 13 F.3d 641, 650 (3d Cir. 1993), cert. denied sub nom., Curcio v. U.S., 511 U.S. 1076, 114 S. Ct. 1660, 128 L. Ed. 2d 377 (1994) and Markoff v. U.S., 513 U.S. 812, 115 S. Ct. 64, 130 L. Ed. 2d 21 (1994)).

The leading case in the Third Circuit on the distinctness requirement under § 1962(c) is Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., Inc., 46 F.3d 258 (3d Cir. 1995). In that case, the Third Circuit held that the defendant “persons” must be separate and distinct from the named enterprise. However, the Third Circuit in Jaguar Cars stated:

[W]e conclude that when officers and/or employees operate and manage a legitimate corporation, and use it to conduct, through interstate commerce, a pattern of racketeering activity those defendant persons are properly liable under § 1962(c).

Jaguar Cars, 46 F.3d at 269. In the Amended Complaint, Plaintiffs allege that individual Defendants Frederick Shapiro and Bruce Shapiro are officers of Boro, which is alleged to be in the business of providing electrical services (Am. Comp. ¶ 9) and is both the “enterprise” (Am. Comp. ¶ 39) and also a Defendant as to the claim made under § 1962(a) (Am. Comp. ¶ 9). The issue is whether Plaintiffs’ allegations satisfy Jaguar Cars.

In Cedric Kushner Promotions Ltd. v. King, 533 U.S. 158, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001), the Supreme Court upheld the Third Circuit’s interpretation of § 1962(c) in Jaguar

Cars, and rejected the views of other circuit courts requiring much more distinctness than a mere separation of a corporation from its officers. While acknowledging the split among the circuit courts concerning how much distinctness was sufficient, the Supreme Court held that it found nothing in the statute that required more separateness than the formal legal distinction between a person and a corporation. The Court ruled that § 1962(c) “requires no more than the formal legal distinction between ‘person’ and ‘enterprise’ (namely, incorporation) that is present here.” King, 533 U.S. at 165. Because a corporate owner or employee was a natural person, the Court found that he or she was distinct from the corporation itself, which constituted a legally different entity with different rights and responsibilities. The Court added, “a corporation owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status.” Id. at 163.

Applying this principle, the Supreme Court found that King, as an individual person, was legally distinct from his corporation. Thus, the Court held that the distinctness requirement was met when a corporate employee unlawfully conducted the affairs of the corporation of which he was the sole owner, regardless of whether he conducted those affairs within, or beyond, the scope of corporate authority.

In their § 1962(c) claims against Defendants Frederick Shapiro and Bruce Shapiro, Plaintiffs allege that Defendant Boro constituted an “enterprise” through which “persons,” Boro, Frederick Shapiro, and Bruce Shapiro, acted.³ Because Defendants Frederick Shapiro and Bruce

³ Plaintiffs have not carefully pleaded the allegations as to Boro. Plaintiff do not indicate Boro as a defendant in their introductory headings as to Counts X-XV, which allege violations of § 1962(c). As noted above, Plaintiffs assert Boro is the enterprise as to § 1962(c). However, also indicating that Boro is a “person” under § 1962(c) is somewhat contradictory. Further, by the wholesale incorporation of the § 1962(a) Counts (where Boro is a defendant) into the §

Shapiro are alleged to be employees and corporate officers of Boro, the alleged enterprise, Plaintiff may bring § 1962(c) claims against them. The Court, therefore, finds that Plaintiffs have adequately pled “enterprise” under § 1962(c), as to Defendants Frederick J. Shapiro and Bruce H. Shapiro.

2. Section 1962(a)

Although § 1962(c) requires a distinction between a person and an enterprise, there is no distinctiveness requirement under § 1962(a). Leonard A. Feinberg, Inc. v. Central Asia Capital Corp., 974 F. Supp. 822, 850 (E.D. Pa. 1997) (citations omitted). “[A]n entity can be both an enterprise and a defendant for purposes of § 1962(a).” Kehr Packages v. Fidelcor, Inc., 926 F.2d 1406, 1411 (3d Cir. 1991), cert. denied, 501 U.S. 1222, 111 S. Ct. 2839, 115 L. Ed. 2d 1007 (1991).

Therefore, Boro can be both a defendant and the enterprise under § 1962(a), and the Court finds that Plaintiffs have adequately pled “enterprise” under § 1962(a) against all Defendants.

Thus, Plaintiff have adequately pleaded an “enterprise,” but as the following discussion shows, Plaintiff has not satisfied the other pleading requirements of RICO.

B. Pattern of Racketeering Activity

Bonavitacola I summarized the legal requirements of pleading a pattern of racketeering activity, and required Plaintiffs to allege:

- b. As to the racketeering activity alleged under each RICO Count,

1962(c) Counts, Plaintiffs have, by their literal allegations, named Boro as a defendant under § 1962(c). If Plaintiffs’ Amended Complaint was otherwise sufficient, the Court would overlook these pleading defects.

include the following:

- i. List each predicate act which Plaintiffs allege constitutes the RICO violation, including such specifics as names, dates and types of communications or acts.
- ii. Describe how each predicate act is fraudulent and/or part of a pattern of racketeering activity.
- iii. State how the alleged predicate acts relate to each other as part of a common plan.

Bonavitacola I, 2002 WL 31388806, at *5.

1. Predicate Acts

Plaintiffs allege that Defendants committed various unspecified predicate acts of mail fraud and wire fraud. (Am. Compl. ¶¶ 41, 48, 55.) The mail fraud statute, 18 U.S.C. § 1341, applies only where the defendant uses the U.S. mails as “part of the execution” of a fraudulent scheme. Schmuck v. United States, 489 U.S. 705, 710, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989). The wire fraud statute, 18 U.S.C. § 1343, “is identical to the mail fraud statute except it speaks of communications transmitted by wire,” i.e. telephone, radio, or television, and does not apply to intrastate communications. United States v. Frey, 42 F.3d 795, 797 (3d Cir. 1994). The Court of Appeals has noted that “cases construing the mail fraud statute are applicable to the wire fraud statute as well.” Id. at 797 n.2 (quoting United States v. Tarnopol, 561 F.2d 466, 475 (3d Cir. 1977)).

The requisite elements of mail or wire fraud are: (1) a scheme to defraud; (2) use of the transmissions to further that scheme; and (3) fraudulent intent. Werther v. Rosen, No. CIV.A.02-3589, 2002 U.S. Dist. LEXIS 22262, at *7 (E.D. Pa. Oct. 30, 2002) (citing U.S. v. Pharis, 298 F.3d 228, 233 (3d Cir. 2002)). “A scheme or artifice to defraud need not be fraudulent on its face, but must involve some sort of fraudulent misrepresentations or omissions reasonably

calculated to deceive persons of ordinary prudence and comprehension.” Kehr Packages, 926 F.2d at 1415 (quoting United States v. Pearlstein, 576 F.2d 531, 535 (3d Cir. 1978)). Further, “when alleging mail and wire fraud as predicate acts in a RICO claim, plaintiff’s pleadings must identify the purpose of the mailing within the defendant’s fraudulent scheme and specify the fraudulent statement, the time, place, and speaker and content of the alleged misrepresentation.” Werther, 2002 U.S. Dist. LEXIS 22262, at *7-8 (citing Annulli v. Panikkar, 200 F.3d 189, 201 n.10 (3d Cir. 1999)).

In Allen Neurosurgical Assoc., Inc. v. Lehigh Valley Health Network, No. CIV.A.99-4653, 2001 U.S. Dist. LEXIS 284 (E.D. Pa. Jan. 18, 2001), Judge O’Neill set forth the principles under Federal Rule of Civil Procedure 9(b), which provides that “in all averments of fraud and mistake, the circumstances constituting fraud and mistake shall be stated with particularity.” FED. R. CIV. P. 9(b). When the predicate acts in a RICO complaint sound in fraud, Rule 9(b) applies. Id. at *8 (citing Rose v. Bartle, 871 F.2d 331, 357 (3d Cir. 1989)). “Rule 9(b) requires plaintiffs to plead with particularity the ‘circumstances’ of the alleged fraud in order to place defendants on notice of the precise misconduct with which they are charged, and to safeguard against spurious charges of immoral and fraudulent behavior .” Id. (quoting Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 791 (3d Cir. 1984), cert. denied, 469 U.S. 1211, 105 S. Ct. 1179, 84 L. Ed. 2d 327 (1985)). This generally requires the plaintiff to plead the “who, what, when, and where details of the alleged fraud.” Id. (quoting U.S. ex rel. Waris v. Staff Builders, Inc., No. CIV.A.96-1969, 1999 U.S. Dist. LEXIS 2998, at *4 (E.D. Pa. Mar. 4, 1999)). While a complaint need not set out “precise words,” it should adequately describe the nature and subject of an alleged misrepresentation. Id. (citing Seville, 742 F.2d at 791).

Nonetheless, courts should not focus “too narrowly” on the particularity language of Rule 9(b), and should take into account the “general simplicity and flexibility contemplated by the rules.”

Id.

In applying the principles of Rule 9(b) in Allen Neurosurgical Assoc., Inc., Judge O’Neill stated, in relevant part:

[M]ost of the potential predicate acts listed in the RICO Case Statement are not pled with the particularity required by Rule 9(b). Plaintiff does not plead the “date, place or time” of the alleged misrepresentations, which, though not an absolute requirement under Rule 9(b), would “inject precision and some measure of substantiation” into the allegations. See Seville, 742 F.2d at 791. Nor does plaintiff plead “who made the representations” at issue. See Saporito v. Combustion Eng’g, 843 F.2d 666, 675 (3d Cir. 1988) cert. granted and judgment vacated on other grounds, 489 U.S. 1049 (1989) Similarly, plaintiff does not plead “who received the allegedly fraudulent information.” Id.; Smith v. Berg, 1999 U.S. Dist. LEXIS 18298, No. 99-2133, 1999 WL 1081065, at *4 (E.D. Pa. Dec. 1, 1999) Finally, plaintiff pleads nothing of the content of each alleged misrepresentation. Saporito, 843 F.2d at 675 (allegations should include “the general content of the representations”); Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644, 658 (3d Cir. 1998) (allegations of mail fraud should contain the “precise content of each particular mailing”); Smith, 1999 U.S. Dist. LEXIS 18298, 1999 WL 1081065, at *5 (same).

In short, plaintiff is not pleading “acts” of mail and wire fraud Where the Rule 9(b) standard applies, plaintiff is not entitled to the inference that the essential elements of mail and wire fraud occurred; plaintiff must plead those essential elements with particularity.

Allen Neurosurgical Assoc., Inc., 2001 U.S. Dist. LEXIS 284, at *9-12.

In the present case, because Plaintiffs allege that Defendants “knowingly and repeatedly used the United States Mails and/or interstate wire transmissions in violation of 18 U.S.C.A. §1341 and § 1343” to “effect the fraudulent scheme” (Am. Compl. ¶¶ 41, 48, 55), Rule 9(b) applies to the Amended Complaint. The Amended Complaint does not contain any details of predicate acts, as required under Rule 9(b) and also required by Bonavitacola I, as stated above.

There are no specific allegations of: (1) the purpose of the mailing within the defendant's fraudulent scheme, (2) the content of the fraudulent statement, (3) how the statement or any other communications was false or misleading, (3) the time, place, and speaker and content of the alleged misrepresentation, (4) how the fraudulent statement contributed to the alleged fraudulent scheme, (5) who made the fraudulent statement at issue, or (6) who received the fraudulent statement. Bonavitacola I clearly set forth that such detail would be required in the Amended Complaint. The allegations that Plaintiffs have added (the subparagraphs in ¶ 42) do not add the requisite information. These subparagraphs only allege that certain Certified Payroll Reports were false. There is no allegation that these allegedly false reports were sent by mail or wire, or by whom or to whom they were sent. The Court, therefore, finds that Plaintiffs have failed to plead mail and wire fraud as predicate acts with particularity as required.

2. Relatedness

The "relatedness" prong requires that the predicate acts "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." H.J. Inc., 492 U.S. at 240 (quoting Organized Crime Control Act of 1970, 18 U.S.C. § 3575 et seq. (partially repealed)); Tabas v. Tabas, 47 F.3d 1280, 1292 (3d Cir. 1995). The Third Circuit has applied a six factor test to assess the sufficiency of continuity and relatedness to form a pattern under RICO. Curtin, 1999 U.S. Dist. LEXIS 19467, at *13. These factors are: (1) number of unlawful acts; (2) length of time over which the acts were committed; (3) similarity of the acts; (4) number of victims; (5) number of perpetrators; and (6) character of the unlawful activity. Id. at *13-14 (citation omitted).

In holding that the plaintiff failed to establish relatedness and, thus, did not sufficiently plead a pattern of racketeering activity in Gintowt v. TL Ventures, 226 F. Supp. 2d 672 (E.D. Pa. 2002), (although allowing leave to amend) this Court stated:

Nor does the pleading, as written, satisfactorily tie each Defendant's alleged individual or joint conduct to "fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension." Kehr Packages, 926 F.2d at 1415. This Court is mindful that, in this RICO case, as in an antitrust case, the "character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 8 L. Ed. 2d. 777 (1962). Yet, even viewing together the many "dots" of fraud alleged, Plaintiff's Complaint . . . fails to connect those dots in the language and particulars of RICO.

Gintowt, 226 F. Supp. 2d at 678.

The Court's conclusion that Plaintiffs failed to sufficiently plead any details of the alleged mail and wire fraud as predicate acts in the Amended Complaint almost inevitably leads to a conclusion that the relatedness requirement is similarly missing. Even assuming that the Amended Complaint adequately alleges two or more predicate acts, however, Plaintiffs' Amended Complaint fails to allege the requisite relatedness, even though Bonavitacola I clearly required that the RICO case statement "state how the alleged predicate acts related to each other as part of a common plan." The Amended Complaint does not set forth any details about the purposes, results, participants, victims, or methods of commission of the alleged predicate acts, or prove that the alleged predicate acts are otherwise interrelated. Plaintiffs give no reason for ignoring the Court's clear instructions in Bonavitacola I.

In Plaintiffs' brief in opposition to the Motion to Dismiss, the Plaintiffs assert that ¶¶ 31, 41 and 42 of the Amended Complaint adequately allege the required elements of relatedness (and

also continuity, as discussed below). (Mem. Opp’n Mot. Dismiss at 10.) It is relevant to note that Plaintiffs do not cite any cases whatsoever in support of the sufficiency of their RICO allegations. Nor does Plaintiffs’ brief at any time refer to the RICO case statement required in Bonavitacola I. Rather, Plaintiffs’ brief only argues that ¶¶ 31, 41 and 42 of the Amended Complaint “demonstrates [sic] that the alleged predicate acts of racketeering were ‘related’ in that the actions described had the same purpose of procuring electrical construction contracts and subverting the Pennsylvania Prevailing Wage Act and/or the Davis-Bacon Act,” and that these paragraphs demonstrate that the relationship requirement is met because “the actions described have a similar method of commission” and “were not isolated acts but part of a scheme to defraud.” (Mem. Opp’n Mot. Dismiss at 9-10.) These arguments in Plaintiffs’ brief are merely repetitive of the conclusory allegations, but the allegations themselves do not have the requisite details. In fact, the Amended Complaint does not have any discussion whatsoever of what Defendants’ “method of commission” was nor does it describe in any detail what was Defendants’ “scheme to defraud.”

Plaintiffs conclude, on page 10 of their brief, “the totality of the allegations set forth in the Complaint suggest that the defendants routinely do business through the use of the predicate acts or that there is real threat that the defendants will do so in the future.” This statement does not accurately summarize any of the allegations in the Amended Complaint, which should have complied with the RICO case statement. If Plaintiffs had the ability, and had taken the trouble, to comply, they would have met the pleading requisites for a RICO case. As noted above, Plaintiffs do not at any time cite to the Court’s RICO case statement, object to it, argue that it is improper, or purport to have complied. Although it was designed to be helpful to Plaintiffs, it has simply

been ignored. There is no basis in the Amended Complaint to conclude that Defendants routinely do business in the manner in which Plaintiffs allege, there are no details as to how or why the Certified Payroll Reports are false, there are no details that this was a broad scheme to defraud but merely, because it is existed in several years between 1993 and 2001, that it will continue into the future.

The Court, therefore, finds that Plaintiffs' Amended Complaint fails to adequately allege relatedness as to all Defendants.

3. Continuity

The "continuity" prong refers either to an "open-ended scheme," consisting of past conduct that by its nature projects into the future with a threat of repetition, or to a "closed-ended scheme," consisting of a closed period of repeated conduct. Curtin, 1999 U.S. Dist. LEXIS 19467, at *15-16 (quoting H.J. Inc., 492 U.S. at 241). Plaintiffs do not discuss this concept in their Amended Complaint or brief. A short-term fraudulent scheme posing no threat of future criminal conduct cannot satisfy the continuity requirement. Kehr Packages, 926 F.2d at 1412. A plaintiff must prove a regular way of doing business in an "open-ended scheme" or a series of related acts lasting a "substantial period of time" in a "closed-ended scheme." Id. at *16 (citations omitted). With respect to a "closed-ended scheme," the Third Circuit has developed a durational requirement of at least twelve months, which time period is measured between the first and last predicate acts alleged. Plater-Zyberk v. Abraham, No. CIV.A.97-3322, 1998 U.S. Dist. LEXIS 1736, at *23-24 (E.D. Pa. Feb. 18, 1998) (citing Tabas, 47 F.3d at 1293).

Plaintiffs' Amended Complaint fails to allege the requisite continuity. The Amended Complaint fails to adequately plead "open-ended" continuity because it does not expressly allege,

or provide a basis from which the Court could reasonably infer, that Defendants' alleged misconduct poses a threat of future criminal activity. See Lubart v. Riley & Fanelli, P.C., No. CIV.A.97-6392, 1998 U.S. Dist. LEXIS 10109, at *33. (E.D. Pa. June 22, 1998) (finding that the proposed complaint failed to adequately plead open-ended continuity where the fraudulent conduct did not extend beyond the life of the matter before the court and where there were no allegations suggesting a future threat). Although the original Complaint was filed on October 31, 2001, the Amended Complaint was not filed until November 11, 2002. Plaintiffs omit any allegations of events in the intervening twelve months.

The Amended Complaint also fails to adequately plead "closed-ended" continuity. Although the time period between the first allegedly false Certified Payroll Report (February 26, 1993) and the last Report (June 29, 2001) alleged is over eight years, there are no allegations of false reports for the years 1994, 1995, 1998 – which omission in and of itself dispels any notion of continuity. Plaintiffs have failed to establish that the predicate acts are related,⁴ which is required for "closed-ended" continuity. H.J. Inc., 492 U.S. at 242. The Court, therefore, finds that Plaintiffs' Amended Complaint fails to adequately allege continuity with respect to all Defendants.

In sum, Plaintiff have failed to allege what many courts have required for a RICO complaint - a scheme to defraud, with a pattern of related, continuing criminal activity. There is no allegation of any connection of the allegedly false reports submitted to the Ridley School District, the Neshaminy School District, and the Department of Navy. There is no allegation as to what other business the Defendants engaged in and whether they used false payroll reports in

⁴ See discussion supra Part IV. B. 2.

order to get that other business. If, for example, over these eight years, Defendants had 100 different contracts, the fact that they may have committed fraud as to three of them (Ridley School District, Neshaminy School District and the Department of Navy) would be plainly insufficient to constitute a scheme under RICO. If these contracts were the only contracts, or a majority of the total number of contracts, then a RICO scheme may exist. There is no way to tell from the Amended Complaint.

C. Injury

To prevail in a civil action for damages under RICO, a plaintiff must establish a violation of § 1962, allege an injury to his or her business property “by reason of” the alleged violation of § 1962, and plead the requisite causal connection between the injury and the violation of § 1962. Tri-County Concerned Citizens Assn. v. Carr, No. CIV.A.98-4184, 2001 U.S. Dist. LEXIS 14933, at *17 (E.D. Pa. Sept. 18, 2001). The Supreme Court has determined that the phrase “by reason of” in § 1964(c) requires a plaintiff to show the alleged RICO violations proximately caused the plaintiff’s injury, meaning that the violation cannot be too remote from the injury.⁵ Id. (citing Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)).

There are three factors to consider in a proximate cause analysis in a RICO claim:

(1) the directness of the injury – “the more indirect the injury, ‘the more difficult it becomes to ascertain the amount of a plaintiff’s damages attributable to [defendant’s wrongdoing], as distinct from other, independent, factors;” (2) the difficulty of apportioning damages among potential plaintiffs – “allowing recovery by indirectly injured parties would require complicated rules for

⁵ The proximate cause requirement the Supreme Court imposes of civil RICO claims is an aspect of standing rather than an element of a plaintiff’s civil RICO prima facie case. Carr, 2001 U.S. Dist. LEXIS 14933, at *18 n.4 (citations omitted).

apportioning damages;” and (3) the possibility of other plaintiffs vindicating the goals of RICO – “direct victims could generally be counted on to vindicate the policies underlying” RICO in a better manner than indirect victims.

Id. at *18-19 (quoting Allegheny Gen Hosp. v. Philip Morris, Inc., 228 F.3d 429, 443 (3d Cir. 2000) (internal citations omitted)).

A threshold question is whether Plaintiffs have alleged facts, which, if taken as true, sufficiently establish proximate causation. Id. at *19. The following are Plaintiffs allegations of injury and proximate cause as set forth in the Amended Complaint:

a. Plaintiff Bonavitacola’s Alleged Injury by All Defendants

In Counts I-III, Plaintiff Bonavitacola alleges that Defendants “received income derived from the pattern of racketeering activity . . . and used or invested such income in the establishment or operation of [Defendant Boro].” (Am. Compl. ¶¶ 43, 50, 57.) Plaintiff Bonavitacola further alleges that “[b]ut for [Defendants’] investment of the income derived from the pattern of racketeering . . . into the establishment or operation of [Defendant Boro], [Plaintiff Bonavitacola] would have been able to compete with [Defendant Boro] on a fair and honest basis and [would have been] awarded the contract for public work by the Ridley School District to provide electrical construction in connection with the . . . Ridley High School project.” Id. ¶¶ 44, 51, 58. Finally, Plaintiff Bonavitacola alleges that “[a]s a proximate result of [Defendants’] violation of 18 U.S.C.A. § 1962(a), [Plaintiff Bonavitacola] has suffered damages in the way of a loss of income and revenue.” Id. ¶¶ 45, 52, 59.

b. Plaintiff Local Union 654's and Plaintiff Local Union 98's Alleged Injury by All Defendants

In Counts IV-IX, Plaintiffs Local Union 654 and Local Union 98 allege that “[b]ut for

[Defendants'] investment of the income derived from the pattern of racketeering . . . into the establishment or operation of [Defendant Boro], [Plaintiffs Local Union 654 and Local Union 98] would have received contributions to multi-employer benefit plans for employees in connection with the . . . public work project awarded by the Ridley School District.” Id. ¶¶ 61, 64, 67, 70, 73, 76. Plaintiffs Local Union 654 and Local Union 98 further allege that “[a]s a proximate result of [Defendants'] violation of 18 U.S.C.A. § 1962(a) [Plaintiffs Local Union 654 and Local Union 98 have] suffered damages in way of a loss of income and revenue.” Id. ¶¶ 62, 65, 68, 71, 74, 77.

c. Plaintiff Bonavitacola's Alleged Injury by Defendants Frederick Shapiro and Bruce Shapiro

In Counts X and XI, Plaintiff Bonavitacola alleges that “[b]ut for [Defendant Frederick Shapiro's and Defendant Bruce Shapiro's] falsifications and conduct alleged herein [Plaintiff Bonavitacola] would have been able to compete with [Defendant Boro] on a fair and honest basis and [would have been] awarded the contract for public work by the Ridley School District to provide electrical construction on the . . . Ridley High School project.” Id. ¶¶ 80, 84. Plaintiff Bonavitacola further alleges that “[a]s a proximate result of [Defendants Frederick Shapiro's and Defendant Bruce Shapiro's] violation of 18 U.S.C.A. § 1962(c), [Plaintiff Bonavitacola] has suffered damages in the way of loss of income and revenue.” Id. ¶¶ 81, 85.

d. Plaintiff Local Union 654's and Plaintiff Local Union 98's Alleged Injury by Defendants Frederick Shapiro and Bruce Shapiro

In Counts XII-XV, Plaintiffs Local Union 654 and Local Union 98 allege that “[b]ut for [Defendant Frederick Shapiro's and Defendant Bruce Shapiro's] falsifications and conduct alleged herein [Plaintiffs Local Union 654 and Local Union 98] would have received

contributions to multi-employer benefit plans for employees in connection with the . . . public work project awarded by the Ridley School District.” Id. ¶¶ 87, 90, 93, 96. Plaintiffs Local Union 654 and Local Union 98 further allege that “[a]s a proximate result of [Defendants Frederick Shapiro’s and Defendant Bruce Shapiro’s] violation of 18 U.S.C.A. § 1962(c), [Plaintiffs Local Union 654 and Local Union 98 have] suffered damages in way of a loss of income and revenue.” Id. ¶¶ 88, 91, 94, 97.

Plaintiffs’ chain of logic is that Defendants submitted false payroll records which did not comply with Pennsylvania’s Prevailing Wage Act and federal law, thus allowing Defendant Boro to submit lower bids which resulted in Defendant Boro, instead of Plaintiff Bonavitacola, being awarded the three public contracts.

There are several gaps in Plaintiffs’ logic as represented by the allegations, which, once again, could have been cured by Plaintiffs’ complying with the RICO case statement described in Bonavitacola I. First, although Plaintiff Bonavitacola alleges that it was the second lowest bidder as to the Ridley School District (¶ 33), it does not make a similar allegation as to the Neshaminy School District and the Department of the Navy. Even as to Ridley School District, it does not necessarily follow that Plaintiff Bonavitacola would have been awarded the contract if Defendant Boro had not bid, or had not been the low bidder, just because it was the next lower bidder. See Northland Equities, Inc. v. Gateway Center Corp., 411 F.Supp. 259, 264 (E.D. Pa. 1977) (holding that it was not certain that the award would have been made to the plaintiff, an unsuccessful bidder, even as low bidder, because other factors can go into the award of a contract in addition to the requirement that the contract be awarded to the low bidder).

However, assuming *arguendo* that Plaintiff Bonavitacola has satisfied the requirements of

pleading proximate cause under RICO, there still remains substantial questions as to whether the other Plaintiffs, the two labor unions, have sufficiently alleged direct injury. As noted above, the Plaintiff labor unions assert that they would have received additional contributions to their multi-employer benefit plans for employees if Plaintiff Bonavitacola had been awarded the contracts. The Court finds that this is an indirect injury because the Complaint does not state the requisite allegations to show how the contract revenues following to Plaintiff Bonavitacola, assuming it had been awarded any contract, would have resulted in benefit to the Plaintiff labor unions. In addition, Plaintiff labor unions do not allege that they themselves have standing to sue for these types of damages, which presumably are for the benefit of the union members. The Amended Complaint is completely silent on this issue.

Accordingly, the Court finds that Plaintiffs have failed to sufficiently plead proximate cause injury and, therefore, lack standing to bring this civil RICO action.

D. Davis-Bacon Act

In its initial Motion to Dismiss, one of Defendants' grounds in moving to dismiss was that there is no private right of action under the Davis-Bacon Act, 40 U.S.C. § 3142 et seq., or the Pennsylvania Prevailing Wage Act, 43 PA. STAT. ANN. § 165-1 et seq.

The Court reserved judgment on this issue until it had the opportunity to determine whether the requisites of RICO were satisfied in Plaintiffs' Amended Complaint.

The Davis-Bacon Act is designed to protect laborers and mechanics employed on government projects from being paid at less than the locally prevailing wage rate. Universities Research Assoc., Inc. v.outu, 450 U.S. 754, 771, 101 S. Ct. 1451, 67 L. Ed. 2d 662 (1981). The Davis-Bacon Act sets forth a detailed administrative scheme to enforce violations of its

provisions, and provides that if the contractor fails to pay the prevailing wages specified in the contract, the government contracting officer may withhold so much of the accrued payments as may be considered necessary to pay the laborers and mechanics the difference between the contract wages and those actually paid. 40 U.S.C. § 3144(a)(1). In the event that these funds are insufficient to reimburse the employees, the laborers and mechanics may have the “right to bring a civil action and intervene against the contractor and the contractor’s sureties.” 40 U.S.C. § 3144(a)(2).

Courts have held that plaintiffs cannot base their RICO claims on alleged violations of the Davis-Bacon Act. Livingston v. Shore Slurry Seal, Inc., 98 F. Supp. 2d 594, 600 (D.N.J. 2000). Because the Davis-Bacon Act is the exclusive remedy for the alleged underpayment of wages for work performed on federal construction projects, there is no private right of action pursuant to the Davis-Bacon Act. Id. at 600-01; see also Miccoli v. Ray Communications, Inc., CIV.A.99-3825, 2000 U.S. Dist. LEXIS 10048, at *6 (E.D. Pa. July 21, 2000) (stating that no private right of action exists under the Davis-Bacon Act) (citing Weber v. Heat Control Co., 728 F.2d 599 (3d Cir. 1984)).

Plaintiffs do not dispute the abstract correctness of the proposition that there is no private right of action under the Davis-Bacon Act, which is well settled in the law. Plaintiffs asserted that the cases relied upon by the Defendants involved instances where the plaintiffs were employees of contractors/subcontractors, alleging that they had been paid at a wage rate below the contract rate for work performed, but that Plaintiffs’ allegations in this case are different. Plaintiffs themselves do not allege that they have not been paid a prevailing wage, but rather, that they have lost business because the Defendants have made fraudulent misrepresentations as to

the Defendants' salary and wage payments, and have used these fraudulent statements to gain business at the expense of Plaintiffs.

The Davis-Bacon Act only provides a cause of action for laborers and mechanics employed on government projects. Plaintiffs have not set forth, and the Court has not found, any caselaw supporting a cause of action for parties who are not laborers and mechanics employed on government projects, but who have alleged damages as a result of violations of the Davis-Bacon Act. Moreover, the Court finds that the cases holding that there is no private right of action under the Davis-Bacon Act are applicable in the present case. Thus, the Court finds that Plaintiffs cannot base their RICO claims on alleged violations of the Davis-Bacon Act.

V. Pendent Jurisdiction

Because the Court will dismiss the RICO claims, there will be no federal anchor claim upon which original subject matter jurisdiction may be based. Pursuant to 28 U.S.C. § 1367(c)(3), the Court will dismiss the pendent state law claims in Counts XVI-XVIII without prejudice. See Markowitz v. Northeast Land Co., 906 F.2d 100, 106 (3d Cir. 1990) ("the rule within this Circuit is that once all claims with an independent basis of federal jurisdiction have been dismissed the case no longer belongs in federal court") (citing Lovell Mfg. Corp. v. Export-Import Bank of the United States, 843 F.2d 725, 734 (3d Cir. 1988)). Plaintiffs may refile their state law claims in state court.

An appropriate Order follows.

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

BONAVITACOLA ELECTRIC	:	
CONTRACTOR, INC., et al.,	:	
	:	CIVIL ACTION
Plaintiffs,	:	
v.	:	
	:	
BORO DEVELOPERS, INC., et al.,	:	NO. 01-5508
	:	
Defendants.	:	

ORDER

AND NOW, this 12th day of February, 2003, upon consideration of Defendants' Motion to Dismiss Amended Complaint (Docket No. 12) and Plaintiffs' Response thereto (Docket No. 15), it is hereby ORDERED that Defendants' Motion to Dismiss Amended Complaint is GRANTED with prejudice as to Counts I-XV, and that Counts XVI-XVIII, based on state law claims, are dismissed without prejudice.

BY THE COURT:

MICHAEL M. BAYLSON, U.S.D.J.